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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 190

MERLIN M. ARMSTRONG, ET AL., *Petitioners*

v.

THE UNITED STATES, *Respondent*

PETITION FOR REHEARING

DONALD S. DAWSON
Attorney for Petitioners
731 Washington Building
Washington 5, D. C.

Of Counsel:

SAVAGE, GIBSON, BENEFIELD & SHELTON
Liberty Bank Building
Oklahoma City, Oklahoma

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully request that this Honorable Court reconsider its action of October 12, 1959 denying petition for certiorari for the following reasons:

1. The question at issue has never been considered on its merits by this Court.
2. The facts in all cases cited as being in conflict are basically identical.

3. The court below has been inconsistent and inaccurate in assigning reasons for the decisions cited as being in conflict.

4. The court below erred in not allowing compensation for actual physical labor performed during nighttime hours.

I

THE QUESTION AT ISSUE HAS NEVER BEEN CONSIDERED ON ITS MERITS BY THIS COURT

This case presents for decision the question of whether the Federal Government can keep its employees on the job all night without paying them.

Undoubtedly because of the lack of opportunity for oral argument and for fuller presentation of facts, the Court has failed to understand the importance of granting certiorari in this case. In its failure to grant certiorari, it has failed to carry out the most important role given to it by Congress and provided for in its own rules, namely, that of acting as arbiter in making the final decision on important questions involving the definitive interpretation of Federal statutes and of administering the policy governing the United States Courts of Appeals and the Court of Claims, so that each of these courts will not have its own separate and distinct interpretation of Federal laws which are in conflict with the decisions of each of the other courts.

Because this Court has failed to set the guideposts for the Court of Claims and the various Courts of Appeals, there are some four different final decisions on the same principle involving substantially the same set of facts. There are many cases involving these facts that will be affected by this Court's decision. For

example, 117 separate claims are consolidated in the present petition. Counsel for the petitioners have petitions presently pending in the Court of Claims which involve the claims of over 750 petitioners and the court below has pending before it some 101 cases for 2655 plaintiffs, all involving the same precise question. Substantial justice will thus be denied to several thousand Federal employees unless this Court makes a final decision in this murky field, which will give the courts a legal guidepost to stand out above the morass of conflict obscuring the way.

The factual situation is simple. The employees were engaged for 24 hours a day with the understanding they were to be on duty for that entire period. They were employed to provide 24-hour protection for the Government's property. If they had not been on the job it would have been necessary for the Government to have employed others and to pay them. The entire 24 hours devoted by these employees was for the benefit of the Government. They were only paid for 16 hours, although the applicable statute provided they should receive compensation for "all hours of employment."[1]

This Court has decided that time spent in a stand-by capacity during which the employees could play checkers, dominoes, or while away the time in purely personal pursuits was compensible.[2]

The same principle is applicable in the case at bar. The employee is under orders. He is giving up his per-

[1] Federal Employees Pay Act of 1945, 59 Stat. 295, as amended by 5 U.S.C. 911, 921.

[2] *Armour & Co.* v. *Wantock*, 323 U.S. 126 (1944); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, (1944); *M.K. & T. Railway Co.* v. *United States*, 231 U.S. 112 (1913).

sonal freedom. He is not spending his time as he would choose. He is benefiting his employer. It is inconsistent to make a distinction between an employee who is subject to call but who is sleeping and one who is subject to call and is listening to the radio or playing solitaire.

This Court should consider the question of nighttime and eating time, *which it has never done*, and resolve the inability of the courts to reach a consistent pattern of reasoning. As it stands, the varying decisions of the courts below present doubt and uncertainty.

II

THE FACTS IN ALL CASES CITED AS BEING IN CONFLICT ARE BASICALLY IDENTICAL

In each of the cases previously cited as being in conflict in the court below,[3] the facts are identical, except as to the particular plaintiffs involved, their place of employment and their own specific duties.

All are Federal employees.

All are subject to the same statute.

All are subject to the same Civil Service Commission rules and regulations.

All were employed to work 24 hours a day.

All were required to be on duty for the benefit of the Government.

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[3] *Farley* v. *United States*, 133 C. Cls. 776 (1955); *England* v. *United States*, 133 C. Cls. 768 (1956); *Sawyer* v. *United States*, 138 C. Cls. 152 (1957) cert. den. 355 U.S. 868 (1957); *Ahearn* v. *United States*, No. 332-55, C. Cls. May 7, 1958; and the case at bar.

None was covered by an agreement exempting the nighttimes and eating hours from being compensated.

All were engaged to wait.

With the facts being the same, the court below should have applied the same principle and reached the same conclusion in all cases, but instead, in two cases the decision was based upon a restriction in the plaintiff's freedom of choice to follow her own habits for the benefit of the Government.[4] In another case the court referred to an earlier decision[5] which did involve a specific employee contract exempting the night and eating hours from compensation, but in the case being decided, there was no such contract.[6] In another case[7] the court provided, contrary to the two cases just mentioned, for pay for actual physical labor performed during night hours and meal times. In still a further case,[8] the court below decided the question on the basis of what Congress meant by the words "hours of employment."

As a result of this conflict in reasoning, as applied to identical facts, the attorney has no guideline to follow in advising his clients. This court should declare the principle in no uncertain terms.

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[4] *Farley* v. *United States*, *supra*; *England* v. *United States*, *supra*.

[5] *Gaetke* v. *United States*, 136 C. Cls. 756, 145 F. Supp. 913 (1956).

[6] *Sawyer* v. *United States*, 138 C. Cls. 152, cert. den. 355 U.S. 868.

[7] *Ahearn* v. *United States*, No. 332-55, C. Cls. May 7, 1958.

[8] The case at bar.

III

THE COURT BELOW HAS BEEN INCONSISTENT AND INACCURATE IN ASSIGNING REASONS FOR THE DECISIONS CITED AS BEING IN CONFLICT

It is respectfully noted that in the case at bar the court below stated the question to be "what Congress meant by the words 'hours of employment' ". That mere recitation of the question was the last and only reference to the legislative history of the applicable statute in its opinion. There is not one sentence, nay one phrase, of legislative history cited, except conjecture in one paragraph in which the court below expressed a belief in its own feeling. The fact is, there is no reference in the legislative history to any exception being made for plaintiffs.

On the other hand, the statute is crystal clear in its applicability to the plaintiffs as Federal employees by specifically citing their general classification. Although there are numerous exceptions cited in the statute, plaintiffs are not among those excepted. Although there are a number of sections preserving special forms of pay arrangements, the plaintiffs are not covered thereby even though the previous statute[9] did set up a special premium pay provision for their nighttime work which could have been continued had the Congress desired to keep them in a special class.

The succeeding statute[10] specifically referred to plaintiffs and made provision for compensation for nighttime work.

We think that the Congress in providing special pay arrangements for certain groups in the preceding

[9] Federal Employees Pay Act of 1943, 57 Stat. 75.

[10] Federal Employees Pay Act of 1954, 68 Stat. 1111.

statute and in the succeeding statute could not have overlooked the necessity for making provision for some form of pay for the night hours plaintiffs were required to be on the job. It would not expect them to be there without any compensation. Therefore, the absence of any special arrangement and the clear applicability of the statute to plaintiffs, the fact that exceptions were made for others confirms that Congress meant them to be paid for all hours on the job.

In its decision, the court below stated that employees are not entitled to compensation for time spent in sleeping and eating because that has been the uniform holding of the court except in two cases "where substantial labor was performed during the time set aside for sleeping and eating."

We respectfully note that the record does not show any substantial labor being performed in the two cases referred to: *Farley* v. *United States*, 133 C. Cls. 776 (1955) and *England* v. *United States*, 133 C. Cls. 768 (1956). In fact, the court stated in *Farley* v. *United States*, *supra*, that its basis for deciding in favor of the plaintiff was that "her freedom of choice to follow her own habits was restricted for the benefit of the defendant."

The court below furthermore states that it has been generally understood that sleeping and eating time should not be compensated because that was the clear intimation of this Court in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944) and *Armour & Co.* v. *Wantock*, 323 U.S. 126 (1944). We respectfully submit this is inaccurate as no such inference can be drawn from those cases. In fact, the intimation is clearly the opposite:

> "Of course, an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for

something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired quite as much a service itself and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer." *Armour & Co.* v. *Wantock, supra.*

We respectfully note that the court below erred again in stating that the plaintiffs had been compensated for all work actually performed. Such is not the case for they were not compensated for any work actually performed during nighttime hours.

The court below refers in its opinion to a computation made to show the number of hours in which plaintiffs performed actual physical labor. But the court failed to state that this computation did not distinguish the work performed as between daytime and nighttime hours. The records actually show that much of the work was performed at night for which they received no pay.

IV

THE COURT BELOW ERRED IN NOT ALLOWING COMPENSATION FOR ACTUAL PHYSICAL LABOR PERFORMED DURING NIGHTTIME HOURS

The court below stated in *Avary* v. *United States*, C. Cls. No. 266-56 and *Collins* v. *United States*, C. Cls. No. 141-56 that "Time spent in actual labor during these periods (sleeping and eating time) is compensable under Sections 201 and 301 of the Federal Employees Pay Act, *supra*. To the extent that plaintiffs have not been compensated for work actually per-

formed during periods set aside for sleeping and eating, they are entitled to recover."

This same decision was reached in *Ahearn* v. *United States*, C. Cls. No. 332-55 (1958):

> "Where a substantial amount of time was spent on these duties during eating and sleeping time, such as desk watch for instance, plaintiffs are to be compensated therefor . . ."

The court below, therefore, erred in not allowing compensation for actual physical labor performed during sleeping and eating time by plaintiffs in the case at bar in accordance with the above quoted decisions, and as specifically prayed in the plaintiffs' original petition.

It should be noted that the case a bar was before the court below on the question of liability only. Proof need not have been adduced to show the exact amount claimed or the number of hours spent by each plaintiff in actual physical labor during sleeping and eating hours. Such proof after the question of liability had been determined in their favor, would have been placed before the court in due course and in accordance with the established rules.[11]

[11] Memorandum re Retrial Conference, 12/13/56.

CONCLUSION

For the foregoing reasons petitioners move for a rehearing.

Petitioners' counsel certifies that this petition is presented in good faith and not for the purpose of delay on the basis of substantial grounds available to petitioners not previously presented.

Respectfully submitted,

DONALD S. DAWSON
Attorney for Petitioners
731 Washington Building
Washington 5, D. C.

Of Counsel:

SAVAGE, GIBSON, BENEFIELD & SHELTON
Liberty Bank Building
Oklahoma City, Oklahoma